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**Issue Date: 27 January 2003**

**Case No.: 2002-AIR-00012**

**In the Matter of**

**SAM HERCHAK**

**Complainant**

**v.**

**AMERICAN WEST AIRLINES, INC.**

**Respondent**

**DECISION AND ORDER DENYING RELIEF**

Preface

In issue is whether the disciplinary action taken against Complainant on July 9, 2001, was in retaliation for safety and maintenance concerns Complainant voiced over the years. I find it was not.

That Complainant voiced safety concerns or that he is an excellent pilot were never issues in this case. Complainant is a graduate of the Air Force Academy and has been a pilot with the Respondent airline for 18 years. He initially flew 737 aircraft and later changed to B-757's which affected his seniority as far as monthly route bidding was concerned.

Since the 1995 collective bargain agreement between the union and Respondent, Complainant, and the other pilots who fly B-757's, often have to fly schedules which involve cross country "flip flop" trips that leave them fatigued. These "pairings" are both union and FAA approved, but Complainant has found them tiring and been very vocal about his distress about such schedules. The manner, however, in which Complainant has chosen to express his concerns and displeasure has often been less than tactful and has not made him popular with management or, for that matter, with some of his own colleagues and the pilot's union.

Somewhere I read that as human beings not only do we wish to be “right,” but we want to be perceived as being “right” by others. When such a perception does not occur we often go to great, and sometimes costly, measures to prove our “rightness.” In my mind, that is exactly what Complainant’s anger over the union and FAA approved scheduling process has caused in this instance.

Perhaps had Complainant used his energies toward tactful union involvement, rather than allowing his aggression to lead to negative and destructive behavior toward both management and co-workers, this case would not be before me. Complainant, however, did not employ such a diplomatic approach, rather he exploded on numerous occasions, both verbally and in writing, and the final such verbal attack on a scheduler caused Respondent’s Chief Pilot, J. R. Baker, to recommend a Section 19 letter of reprimand be placed in Complainant’s personnel file. From the evidence, I do not find that the letter came about as retaliation for safety concerns made by Complainant over the years, but rather that it came about because of Complainant’s conduct toward a fellow employee. Consequently, I do not find from the totality of the evidence that Complainant was the recipient of adverse action (Section 19 letter) because of any protected activity on his part.

### Background

This case arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, Public Law 106-181, 49 U.S.C. §42121, (“Act”). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (“FAA”) or any other provision of Federal law relating to air carrier safety.

On September 4, 2001, Sam Herchak (“Complainant”) filed a complaint with the Department of Labor against his employer, American West Airlines, Inc. (“Respondent”) alleging discrimination against him in violation of the Act in retaliation for his having communicated safety and regulatory concerns both to Respondent and the Federal Aviation Administration (“FAA”). On January 10, 2002, the Regional

Administrator for the Occupational Safety and Health Administration, Region IX, San Francisco, California (OSHA), determined Complainant's complaint had merit. Specifically, OSHA determined Respondent failed to demonstrate that Complainant's protected activity was not a contributing factor in Respondent's alleged unfavorable decision. OSHA thus issued an Order requiring removal of the Section 19 letter from Complainant's employment records and awarded monetary damages. Respondent objected to OSHA's findings, and by letter dated February 12, 2002, filed a request for formal hearing.

This matter was referred to the Office of Administrative Law Judges (OALJ) and assigned to me. Following a telephonic conference with counsel for both parties, by agreement this case was initially set for hearing on April 23, 2002. However, due to discovery delays, and with the consent of all parties, the matter proceeded to trial on September 10, 2002, and was completed on September 19, 2002. Initially, the parties were granted 60 days in which to file briefs, and that time was ultimately extended until December 20, 2002.<sup>1</sup>

The trial in this case consumed five days and involved thirteen witnesses and a greater number of depositions, as well as four Administrative Exhibits, 133 Complainant's exhibits and 74 Respondent's Exhibits. The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the standards of the regulations.

### Issues

At the outset of the hearing, the parties stipulated that (1) respondent is subject to the Act and (2) the Complainant is an employee protected under the Act. Otherwise, there were no stipulations and the issues remaining for resolution are:

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<sup>1</sup> Complainant's brief was actually received December 24, 2002, and Respondent's December 26, 2002.

1. Whether the Complainant engaged in protected activity under the Act;
2. Whether the Respondent knew or had knowledge that Complainant engaged in protected activity;
3. Whether the action taken against Complainant was motivated by Complainant's engagement in protected activity; and
4. What damages, if any, the Complainant is entitled to.

### Contentions of the Parties

As set out in his post-hearing brief, although advancing several instances of discrimination, Complainant's contention is that these all provide proof for the illegal reasoning behind Respondent's decision to invoke Section 19 discipline as well as establish why such discipline caused Complainant to suffer a medical/mental condition that rendered him unable to safely operate an aircraft for approximately 18 months.<sup>2</sup> Respondent, of course, disagrees and contends that any disciplinary actions taken were not only legitimate but demanded by Complainant's improper conduct. Specifically, Respondent urges that even if protected activity took place and Complainant suffered an adverse employment action, no nexus between the two can be demonstrated.

### Summary of Relevant Testimony and Evidence

Complainant is a 1977 graduate of the United States Air Force Academy. He started his career with Respondent, a commercial airline, in 1984 as a first officer in the 737 aircraft. He achieved captain status by 1986 and in 1988 became a "check airman," checking other pilots. In the early 1990's, Complainant started flying B-757's. His decision to do this diminished his seniority to bid for scheduled runs with that aircraft. When Complainant started with the Respondent in 1984 there were less than 200 pilots, now that number exceeds 1,700.

According to Complainant, things went quite well with his employment life until 1995 when the union reached a collective bargaining agreement with Respondent that

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<sup>2</sup> Post-Hearing the parties informed me that Complainant had returned to full duty as a pilot for Respondent on November 21, 2002.

required “flip flop” flying schedules. Such scheduling is legal with FAA, but was not popular with some of the pilots because it entails such schedules as flying at night until dawn across the country with a return flight 24 hours later. Complainant opposed the union contract, and for all practical purposes this started his quest to change and/or defeat the requirements of the collective bargaining agreement. What follows is a general chronology of his behavior since 1995 that climaxed with Complainant being placed on disability by his treating psychologist on August 28, 2001, where he remained until he returned to work on November 21, 2002.

1. On August 24, 1995, Complainant wrote a flight cancellation report advising that he was in Seattle, unable to sleep and because he could not “reverse his body clock” he was unfit to fly that day. (CX 1).
2. On March 14, 1996, Complainant wrote FAA advising that Respondent’s flying schedules “contradict human capabilities” and asked that they “ACT NOW!” (RX 1).
3. In a June 9, 1997, letter to CEO Richard Goodmanson, Complainant suggested crew scheduling was covering their tracks and should be out of jobs. (EX 14).
4. On June 20, 1997, Complainant wrote CEO Goodmanson again complaining of crew scheduling. In that letter, Complainant admits he is “angry” and accuses Goodmanson of showing “loyalty to the boss, not the company and employees you oversee.” (EX 2).
5. On July 6, 1997, in an event report to then Chief Pilot Randy Owen, Complainant complained about a “pairing” which left him impaired. Complainant refused to fly and suggested Respondent get rid of such schedules. (CX 2).
6. In another report dated September 16, 1997, Complainant stated to management that “I have to strongly condemn our scheduling’s practice of building pairings that totally flip flop duty cycles.” He requested a written response justifying “flip flop” schedules. (CX 3).
7. In a December 22, 1997, letter written to David Huntzinger, Vice-President of Corporate Safety, Complainant complains of sleep deprivation because of

pairings when crews fly long duty periods. He ends by stating “I expect your answers in writing by the end of next month.” (EX 3).

8. By letter dated January 14, 1999, written to Lee Steele, then Vice-President of Operations, Complainant responded to Mr. Steele’s letter of November 12, 1998, concerning improved maintenance, with the remark “. . . it’s obvious to everyone the under staffing, lack of spare parts/aircraft, the ‘keep-m moving’ corporate culture is what prevents the techs from actually fixing airplanes here.” (CX 4).
9. Gilbert Mook was hired by Respondent as Executive Vice-President and Chief Operating Officer. On October 1, 1999, he wrote a memo expressing concern with “block time” reliability and urged accuracy. (CX 6). Complainant had never meet Mook, but feeling this letter was accusatory and feeling that since the 1995 union contract Respondent had become “punitive” with a “keep’em moving” philosophy, Complainant replied with a hand written memo to “Mook,” asking “whose falsifying block times now?” He concluded with the remark that the operation of Respondent’s airline “is truly a disaster by any measure.” (CX 7).
10. By this time, J. R. Baker had been promoted to Chief Pilot. Baker was a colleague whom Claimant had known and “got along with great” in the early days of their career. On occasion the two had discussed Complainant’s concerns with the pairings and schedules, and on October 1, 1999, Complainant e-mailed Baker regarding “fatigue pairings”:

I can’t believe what i’m seeing again. i thought you guys were going to fix this (obviously the union can’t). flt ops needs to stop this now. draft some mandatory guidelines that prevent this crap, insist they become effective for B160 and beyond, and all of you resign your management positions if “the company” won’t agree.

it’s about time somebody in management did the right thing around here. (CX 8).

11. At Mr. Mook's request (CX 9), Complainant met with him on December 15, 1999, concerning the tone of Complainant's earlier hand written note. Following that meeting, Complainant e-mailed Baker, with whom Complainant's relationship was beginning to deteriorate, to report:

when i brought up the issue of 24 hr flip-flops, i got the same answer: they are legal and don't violate the contract. he also gave me many of the same old cliches like "if you don't like it here, why don't you leave?" (i said get me a lateral transfer to another airline, and i'm outta here!) he was proud of how the airline was "doing better." i explained on-time or completion factor isn't better for me! what about the pairings? (CX 10).
12. By now Complainant maintains that his dialogue with Baker was, not surprisingly, at an end, and Complainant began to make accusations that his block times were "falsified/changed." On February 16, 2000, Complainant refused to continue a flight from Las Vegas because he was too fatigued to "fly the all-nighter." (CX 13).
13. On April 27, 2000, a flight was cancelled due to equipment problems, and in writing up the report Complainant concluded by asking "what is being done about M/X control and the continuing bad decisions/information?" (CX 16).
14. On May 7, 2000, while preparing for a departure, Complainant noticed the Quick Reference Manual (QRH) in the cockpit contained duplicate pages, and contacted the fleet manager. (CX 17). Not remedied to his satisfaction, a second event report was authored by Complainant (CX 18), and by memos dated May 9, 2000, and May 18, 2000, the discrepancies were explained and Complainant was thanked. (CX 19). Still not satisfied, Complainant handwrote a note to Russ Gilmore, who had told Complainant he was "good to go" with the QRH as it was, stating: "... it's obvious you are more interested in shoving airplanes out rather than looking at the facts and getting to the truth." (CX 2).
15. During a flight on May 21, 2000, there was a bomb scare. The flight was delayed. The flight was to go from Las Vegas to Indianapolis, but, according to his report, Complainant knew he would be too fatigued to fly that leg. Because

no reserve pilot could be located in the early hours of that morning, the flight was cancelled and 190 passengers were taken off the flight. In writing up the report, Complainant concluded: "Rather than have reserves in LAS to handle irregular ops or not schedule crews to the biological limits, the Company continues to pressure and intimidate crews to fly fatigued. I for one refuse to break the law just to keep the operation going." (CX 21).

16. When Complainant returned to Phoenix the next day, he was told to come to Baker's office with a union representative. Complainant brought Terry Stadler with him. After discussing fatigue issues for 10 to 15 minutes, Baker informed Complainant he was grounded on restricted duty with pay until he saw a counselor, Nancy Hay. Over Stadler's objection, Complainant was unwilling to following this informal route, but rather asked that formal action be taken against him. (CX 23). Therefore, by letter dated June 1, 2000, Baker outlined to Complainant the nature of his concerns and required that Complainant be examined by Dr. Alvin C. Burstein, a psychiatrist. (CX 24). Baker then wrote Burstein on June 7, 2000, explaining the motivation behind his concerns, which were primarily Complainant's anger. (CX 25).<sup>3</sup> On behalf of Complainant, the imposition of restricted duties (with pay) was appealed to the Professional Standards Committee. (CX 26). In the meantime, Complainant disseminated Baker's letter of June 1, 2000, among other pilots in an apparent effort to give the impression that Baker himself distributed the letter. (CX 27).
17. The results of Dr. Burstein's June 16, 2000, examination of Complainant is found at Complainant's Exhibit 30. Though finding no psychiatric illness which would prevent Complainant from flying, Dr. Burstein noted Complainant had an "obsessive compulsive personality" and as to his anger stated:

Captain Herchak's personality style is one in which he strongly values and treasures rules and what is right and wrong. He is confident and even, at times, over confident in the correctness of his position and, at times, will communicate out of anger. He is more concerned with 'what is right' than with his style or with the effectiveness

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<sup>3</sup> The letter, too long to recite, gives what I find to be a reliable version of Baker's concerns and feelings toward Complainant on the occasion of his referral to Dr. Burstein.



of his communication. He becomes aware, only in retrospect, when his communications have been unhelpful. (CX 30).

18. On July 10, 2000, Complainant filed a grievance against Chief Pilot Baker for fabricating “mental illness” as an attempt at character assignation. Complainant sought a letter of apology. (CX 31).
19. By letter dated August 7, 2000, Complainant wrote the FAA. (CX 32). In that letter he complained of falsification of his block times and inaccuracies with the B757 fleet computer system, ACARS, as well as fatiguing pairings on schedules. The three page letter accused Respondent of intimidation and harassment and pledged to provide information and details as needed to FAA.
20. On September 18, 2000, Complainant wrote Pat Sakole, Respondent’s Safety Vice-President. In that letter Complainant continues to raise the flip-flop pairing issue:

Finally, I have asked AWA management since 1997 to tell me how a person can get two nights sleep on the 24 hour circadian flip-flops we continue to be scheduled for (ER #'s 000239, 000131). No one has ever replied to this question. It’s your turn now. Please provide me with scientific evidence that shows a human being can get two nights sleep in a 24 hour period, beginning at 0400 body-clock time. (CX 34).

21. Unsatisfied with Mr. Sakole’s October 31, 2001, response (CX 41), on December 7, 2000, Complainant responded that he was “insulted” and again posed the fatigued issue and his need for more sleep than the pairings or schedules permitted. In conclusion he tells Mr. Sakole “actions speak louder than words.” (CX 35).
22. An event report filed September 24, 2000, by Complainant complains that the ACARS system is still recording and reporting false block times. (CX 37). A validation of ACARS and its interface with the program Maestro is

recommended. The report was followed up as explained by memo of October 11, 2000. (CX 38).

23. In a letter dated November 13, 2000, Complainant advised then acting Chief Pilot Dan Rogers that there were three problem pairings which “I will not fly as scheduled for safety reasons.” (CX 44). Captain Rogers responded by removing a pairing, but his comment that it was a union contract matter in general did not set well with Complainant, who retorted that Respondent’s fatigue policy was long overdue for revision. (CX 48).
24. Again Complainant wrote the FAA. In this letter of November 13, 2000, he reports inaccuracies with ACARS/Maestro and then turns his anger on FAA:

I am baffled why your office hasn’t required the Company to do something about this. I can “work” with the Company until I’m blue in the face (as I have since 1995 regarding fatigue pairings) but they can’t be forced to listen to a subordinate. This is especially obvious when it’s something they don’t want to hear. The CMO however, has regulatory and monetary means to get results. I must confess however, that your actions (or lack thereof) regarding this issue make my efforts seem even more futile.

I insist you hold the Company accountable for it’s failure to respond to known deficiencies in a timely manner. In return for my trouble and efforts to document and bring these deficiencies to you, I simply ask for a written answer from your office detailing if my complaints were valid, and if so, what corrective action has been imposed. (CX 45).

25. By letter dated November 17, 2000, FAA responded that indeed the problems with ACARS have the potential to affect compliance with flight/duty time regulations. (CX 46). An audit is requested and Complainant is thanked by Respondent for assisting in perfecting the relative new ACAR system. (CX 47).
26. Seeking assistance about his ongoing fatigue concerns, Complainant once more wrote FAA on December 7, 2000 (CX 51), and they in turn responded that, of

course, the regulations prohibited either fatigue flying or employer pressure to do so. (CX 52). However, in response to a later letter (CX 57), Complainant was advised by FAA on February 14, 2001, they would not compel Respondent to answer Complainant's inquires concerning fatigue. (CX 58).

27. Regarding Complainant's three problem pairings, mentioned in his letter of November 13, 2000, Complainant refused two pairings due to "fatigue" and sought "sick" leave as to the third. In response to the latter request, Respondent requested a statement from Complainant's doctor. (CX 54).
28. On January 18, 2001, the Systems Board upheld Complainant's appeal regarding the June 2000, medical evaluation on the grounds that Baker's June 1, 2000, letter failed to set forth sufficient grounds. The Board's decision required all documents referring to the event be removed from Complainant's file. (CX 56). The Board consisted of two pilots and two management personnel. Complainant's reaction was to eventually write an article for the pilot's newsletter entitled "Anatomy of a Witch Hunt." (CX 71). The article made no attempt to conceal Complainant's personality or attitude toward management.
29. On March 14, 2001, Baker, who by then was Senior Director of Operations, sent a memo to all pilots advising of a busy Spring schedule, asking for cooperation and warning: "For those few Lone Rangers out there, let me close with a heads up or how to NOT paint a target on your forehead as we move forward. This can also be construed as a warning that these actions will not be tolerated." (CX 60).
30. On March 31, 2001, Complainant was written up for a refused assignment. (RA). Complainant was on reserve assignment status, required to report when called, but he disputed the legality of being called in to fly on that occasion. After a conversation with Baker, when Complainant was told to fly the trip and grieve it later, another pilot was eventually called and Complainant was written up for an RA. (CX 74). Complainant challenged the RA (CX 61, 64), but the grievance was approved by Chief Pilot Rogers because Complainant never accepted the assignment and debated its legitimacy for 40 minutes necessitating another pilot being called. (CX 69). Exhibit 72 contains the schedulers version of the event. Joseph Chronic, Vice-President of Flight Operations denied Complainant's appeal (CX 80), but Complainant's appeal was ultimately

sustained by the Systems Board on November 8, 2001, because a tape of the conversation could not be found. (CX 90).

31. On May 26, 2001, Complainant was scheduled to fly out of Baltimore but the aircraft had mechanical problems which necessitated cancellation of the trip. Complainant and crew were offered a return flight as passengers (deadhead) to Phoenix, but viewing that as a violation of minimum rest requirements, Complainant opted to return home the following day. Upon his returning, Complainant discovered his rebuilt pairing in Maestro did not accurately reflect his actual duty and rest times on that trip. Upset, he called scheduling on May 27, 2001, and talked first with Supervisor Julie Runk and then Nick Schneider, who Complainant accused of incompetence and fraud. Complainant also had a second conversation with Schneider on May 31, 2001. Employer's exhibit 65 and Complainant's exhibit 106 and 130 contain transcripts of the telephonic conversations, Complainant's exhibit 133 is a recording of the conversations and Complainant's exhibit 68 is Complainant's write up of the episode. In part, Complainant's conversation with Schneider went as follows:

Nick: I am only human. I made a mistake. I'm trying not to -

Herchak: Oh yeah, [inaudible] if I land gear up -

Nick: let it happen again.

Herchak: - it's only human. It's a mistake. But I guarantee you, uhh, there's consequences. So-

Nick: Well, you do whatever you have to do Sam.

Herchak: Right. And I wish you would do your job like you are supposed to do your job -

Nick: Uhh.

Herchak: - because I don't see that happening.

Nick: I'm trying.

Herchak: Well, Nick, uh, you're not brand new. And, uh, like I said, it's either fraud or total incompetence. So -

32. On July 1, 2001, Complainant sought assistance from Tad Lyon, Senior Director of Employee Relations "in destroying the hostile work environment created for me." (CX 75).
33. On July 9, 2001, Complainant was issued a Notice of Charges and Discipline under Section 19 of the Collective Bargaining Agreement for his May 27, 2001, and May 31, 2001, discourteous and unprofessional telephone conversations with scheduling. (CX 76). The two page letter provided appeal rights and noted the discipline to be imposed could be up to and including termination. Complainant, through a union representative, Russ Webber, requested rescission of the charges or that Complainant be removed from service with pay pending the outcome of his appeal. (CX 77). The request was denied by Baker on July 18, 2001. (CX 78).
34. Hearing that Baker had told Eric Edwards he should watch his step and concerned over the threat of termination, Complainant called in sick and placed himself under the care of Dr. James Lane, a psychologist, on July 27, 2001, and was later declared by Dr. Lane to be unfit for duty on August 28, 2001. Complainant said he believed everyone was lying and was out to get him and that he did not trust the appeal process, which he had used with success on two previous occasions.
35. On November 19, 2001, Baker made the following Section 19 determination regarding Complainant's May telephone conversations with scheduling, it provided no punishment other than a warning:

I find your actions to be in violations of the Company's Code of Conduct, paragraph 1, which specifically mandates courteous and respectful treatment of fellow employees and prohibits the use of threatening or abusive language. Accordingly, this letter shall serve as notice that further

inappropriate behavior involving the mistreatment of fellow employees will not be tolerated. This letter shall carry the same weight as the Corrective Action Discussion of the Company's Progressive Counseling process and shall be documented in your personnel file.

36. This finding was upheld by Vice-President Chronic on December 10, 2001, who noted that even after the trip pairing problem was remedied and Julie Runk apologized, Complainant continued to pursue the matter with scheduler Nick Schneider for no purpose other than to "accuse, intimidate and abuse" him. (CX 94).

37. "A Line In The Sand" is the pilot newsletter. Complainant was removed from the communication committee on July 25, 2002, by fellow pilot Brian Bevins because:

Your extensive lists of personal rivalries and antagonisms have alienated such an unusually large and still-growing number of people at every level of our organization that the communication process is impeded. I am required to spend an increasing amount of my time dealing with constituents and clients who prefer not to deal with you in any manner whatsoever. (RX 49).

38. Complainant remained on disability receiving 66 percent of his income until November 21, 2002, when he returned to work as a pilot with Respondent. By this action, Complainant seeks the removal of the §19 letter from his personnel file, the difference in his loss of income, costs and attorney's fees and \$50,000.00 compensatory damages.

### **Julie Runk**

Julie Runk testified at the hearing. She works in scheduling for Respondent and supervises Nick Schneider who works on Maestro which keeps account of pilot's duty hours. On May 27, 2001, she recalled Complainant was returned from Baltimore to Phoenix because a flight had been cancelled due to mechanical difficulty. She said Schneider showed the Baltimore cancelled in Maestro but mistakenly failed to

“rebuild” Complainant’s actual duty time by including his lay over in Baltimore on May 26. She did not feel intimidated by Complainant’s initial call to her as a supervisor but had never heard a pilot suggest “fraud” before. She apologized for the mistake and thought the matter at an end until she overheard Schneider’s portion of a subsequent conversation with Complainant. After the conversation ended she pulled the tape and thought Complainant’s remarks to Schneider unnecessary and unprofessional. She later gave the tape to Captain Baker who advised her not to talk with Complainant again.

### **Nick Schneider**

Concerning his telephone call from Complainant on May 27, 2001, Nick Schneider, who has worked as a scheduler for two years, testified it was not unusual for pilots to express displeasure about schedules, and while he thought Complainant was rude and “gave me an earful,” he holds no grudge against the Complainant. He agreed a pilot’s duty hours are limited and that he had mistakenly and erroneously reported to Maestro, Complainant’s duty hours on the Baltimore trip, but his error was unintentional.

### **James Baker**

James Baker is Chief Pilot and Senior Director of Line Operations. He flies both 737's and B-757's and has been employed with the Respondent 19 years following a 12 year Air Force career. He is in charge of the 1,700 pilots who fly for Respondent and assures regulation compliance. Although written by the legal department, the Section 19 charges against Complainant were initiated by Baker. He testified that his motivation in doing so was his shock and disappointment in Complainant harassing a front line employee, Nick Schneider. It was never his intention to seek termination for Complainant’s actions, but, as he explained to Russ Webber and Eric Edwards, both union reps, Baker said he was trying to keep Complainant from acting out his anger in the manner in which he did. After making the Section 19 recommendation, Baker’s role ended in the matter and it was turned over to Vice-President Chronic, who subsequently denied Complainant’s appeal.

Since becoming Chief Pilot in 1999, Baker testified he had tried to accommodate Complainant with scheduling and listen to his complaints about fatigue pairing. Baker said that early on he had involved the union as far as the Complainant was concerned, but that they had eventually said they could do nothing with Complainant and turned

him back over to Baker. Well before Complainant's conversation with Schneider, Baker explained that Complainant had handwritten many angry memos and had verbal conflicts with grounds people, gate agents, fellow pilots, schedulers and company officials.

Regarding his earlier attempt to have Complainant seen by a psychologist, Baker testified in the meeting that was called to discuss a cancelled flight, Complainant became so angry and loud that Baker felt Complainant should see a professional about his, by then, pattern of conduct. Baker said he suggested it be handled informally, but Complainant demanded formal action and that is how it came about that Complainant was sent to Dr. Burstein. Baker added that as Complainant's anger had accelerated he became concerned Complainant's anger could spill over into the cockpit. The reason he wrote the letter to Dr. Burstein was to put things in context and explain his motivation in sending Complainant to him. (CX 24).

Baker also pointed out that Complainant, as with all pilots, bids trips and is not made to fly. If fatigued a pilot does not have to fly, it is the pilot's call. As far as the schedule pairings are concerned, Baker acknowledged the union and Respondent were still working on a solution. In the meantime, however, they are legal and many pilots fly these schedules with no problem. Baker himself has flown them and considers them a lifestyle issue, for pilots do not work typical 5-day a week jobs.

### **Greg Garger**

Greg Garger is Vice-President of Labor Relations for Respondent. The Systems Board is the last appeal before arbitration. He explained that the Board had granted Complainant's appeal concerning Baker's request for medical evaluation because of lack of information. As to the refused assignment appeal that ended in Complainant's favor, that result was because the tape of the conversation could not be found. Complainant's third appeal concerning the Section 19 letter has never been heard because Complainant chose to put it on hold pending this litigation.

Regarding the Section 19 letter, Garger explained that it simply was put in Complainant's personnel file, which happens to many employees across the country on an annual basis. Such letters contain general language about discharge, but that is not their desire or intent.



## **Dan Rogers**

Dan Rogers is Assistant Chief Pilot, and he acted as Chief Pilot from August 2000, until August 2001. He, not Baker, made the decision concerning Complainant's refused assignment. As Acting Chief Pilot, Rogers remembers one occasion in the fall of 2000 when he gave Complainant the benefit of going home with pay and Complainant still argued with him about excess duty time so as to avoid another trip. This angered Rogers, and he testified that he thought, at the time, of filing an insubordination grievance against Complainant.

## **Gil Mook**

Gil Mook's testimony was presented by video and through deposition. He served as Executive Vice-President CEO with Respondent from April 9, 1999, until December, 2000. As a former Federal Express executive, his purpose was to get the Respondent Airlines running properly and settle a large fine Respondent had incurred with the FAA in 1998. In his opinion, scheduled arrival time performance is the public's report card, and his goal was to enhance that end of the operation. "Block time" is the time plane pushes back from the terminal. Because of inaccuracies between the gate and crew times, Mook wrote a memo on October 1, 1999, seeking improvement of such timekeeping. He was offended at Complainant's handwritten response, thought it out of line and requested a meeting with Complainant. This was his only occasion to meet with Complainant and he found him reactive. He never suggested Complainant be disciplined.

## **Terry Stadler**

Terry Stadler was the union representative who attended the May 2000 meeting with Complainant where Baker requested Complainant be seen by a psychologist Nancy Hay. Stadler has been with Respondent 13 years and until recently was Central Air Safety Chairman. He explained "flip-flop pairings" and gave the example of a pilot starting a late night flight from the west coast to the east coast with a 24-hour lay over and returning during daylight hours. He also called it flying the "backside of the clock." Such flying is legal both with FAA and the union, but Stadler questioned whether a pilot can achieve sufficient restorative sleep to avoid fatigue. Such pairings are fatiguing to some pilots, and the issue is still very much alive with the pilot's union. Respondent, including Baker and Chronic, have advised pilots to call in if fatigued, but

Stadler is not satisfied with the way Respondent has dealt with the situation. He himself has complained on a number of occasions, both verbally and in writing, and called in fatigued, but never been disciplined.

As far as Baker's request that Complainant see a counselor, while questioning the appropriateness in that particular meeting, Stadler said such requests were not unusual occurrences and that he too had seen a counselor at management's request following an incident with a gate attendant. In fact, Stadler testified he encouraged Complainant to do so informally, as Baker had requested, but Complainant, who had gotten loud in the meeting, refused the informal approach because he thought it had implications.

### **Kenneth Garrison**

Kenneth Garrison is a 19 year employee of Respondent and has been Captain since 1984. He has had encounters with both Baker and Rogers over maintenance reports and has been accused by Baker of sabotaging the company. However, despite the appropriateness or inappropriateness of Baker's remarks, Garrison conceded that no discipline actions have ever been initiated against him.

### **Russ Webber**

Russ Webber has been a first officer with Respondent for six and a half years. He has served as Chairman of the Grievance Committee. Pilot grievances are first reviewed by the Chief Pilot then appealed and ultimately can go to arbitration. Under the union contract, Section 19 letters are a form of discipline that can include termination, but Webber never thought Complainant would be terminated in this instance. An alternative approach involves "side letters" which allow the union to deal informally with the problem. The goal is to work out problems with the strong personalities who make up Respondent's ranks so the problem does not spill over into the cockpit.

Webber testified that Complainant and Baker had an ego problem with each other. Baker referred to Complainant as "P-188," which is Complainant's pilot number, and Complainant in turn referred to Baker as "Junior" instead of J. R. While Baker had told Webber, Complainant was costing the airlines money, had said he could fire him and even said something to the effect that he was "going to put antlers on

Complainant and shoot him,” Baker had also told Webber, Complainant was an excellent pilot. Webber does not know of any safety concerns that have caused animosity between the two. Rather, he theorized that it was a personality conflict, that Complainant’s article in the newsletter did not help matters and that Baker used the scheduler telephone incident as a means of getting back at Complainant. Webber doubted Baker would “gloss over” safety issues, and in fact said he knows no one who has had been disciplined for safety issues.

### **Eric Edwards**

Eric Edwards has been with the Respondent since 1998 as a first officer on B-757's. He served on the Government and Executive Affairs Committees. He is a personal friend of Complainant. He is not personally aware of discipline actions taken against Complainant for safety concerns, but he does know Baker dislikes Complainant and in fact he thought the two should put on gloves and “box it out.”

Complainant’s reputation is a “by the book guy,” as is true with 50 percent of Respondent’s pilots. Baker had told Edwards to warn Complainant after the dispatcher incident and was angry with him for the statement he made to DOL.

### **Scott Andrews**

Scott Andrews has been a pilot with Respondent since 1989. At one point he was sub-chairman for the Scheduling Committee and received a Section 19 letter for attempting to remove sensitive documents (pilot summary reports) in 2000. In 2001, Andrews had problems concerning lack of an arm rest on the pilot’s seat in the cockpit and cancelled the flight. When he accused Dan Rogers of harassing him over a safety issue, Rogers ceased. In his position on the Scheduling Committee, Andrews gets a lot of complaints. Arnie Beck complained about an improper assignment and apparently threatened Baker and the scheduler. Andrews told him to “cool it” and if he had a problem call him. Frank Elton is another pilot who is abrupt to schedulers, as is Brad Baker. None were disciplined that Andrews knows about because there is usually a problem with a trip assignment or duty day limit that breeds the confrontations. Andrews gave another example of C. J. Smaltz who was asked to fly a trip that would exceed his monthly duty time. He had to call it to the scheduler’s attention to avoid the trip. If ACARS has not sent in the correct time, Maestro will inaccurately reflect flight and/or duty time. Andrews, in his committee position, files a lot of grievances on

behalf of pilots and wins most. Since the Section 19 event in 2000 he has not been disciplined, and no one has talked to him about Complainant.

### **Clarence King**

Clarence King has been the Boeing Fleet Manager since October, 2001, involving both 737 and B-757 aircraft. Prior to that he was only on the B-757's. He is a pilot as well and has been with the Respondent since 1984. His department is within the flight operation section which is headed by Joe Chronic. King remembers an incident involving a quick reference manual brought to his attention by Complainant. The concern was over duplicate pages in the manual. He advised Complainant to remove the old page of the revised manual, but Complainant refused. While he does not feel that Complainant was necessarily wrong, King says this was not a flight issue. On the other leg of that trip, Complainant found other errors and would not fly until King faxed him a correction.

ACARS was installed in the B-757's starting in August, 1999, to record "push, taxi, off, on and in post-flight information." Subsequently, there were "bugs" in the system regarding recording of the "in" times. Complainant called King about inaccuracies in taxi time. King thanked him for the call. Investigation determined unless the thrust levers were advanced, ACARS would not capture and record the event. FAA also notified King that Complainant called them, saying "he's always calling us."

### **Goff Gray**

Goff Gray was hired in 1986 and has been a captain of 737's since 1987. There have been maintenance problems and complaints with aircraft over the years, and on occasion there have been confrontations with the maintenance department, including maintenance supervisor Williams as well as Gil Mook. As coordinator for the Safety Committee, 737 pilots would often call Gray with safety concerns. Maintenance would complain about these pilots in general and Gray specifically.

When a dispute over the specifications of flaps on a 737 ended with Williams taking the plane out of service, Gray told several people about his difficulty in getting Williams to admit to a problem with the aircraft. When he reported the instance to Rogers, Rogers agreed it should not have happened.

In 1998, Gray had a problem with wing body overheat and refused to fly. The plane was grounded, but when Gray complained to Captain Olin, Baker's predecessor as Chief Pilot, about maintenance, he got no help so he ultimately complained to FAA who promised to monitor maintenance. In 1999, maintenance accused Gray of writing them up to get out of work, so the Chief Pilot started reviewing Gray's complaints of discrepancies. In 2000 he had a confrontation with Mook over a cockpit window which obstructed his vision, but he never talked to Mook again.

In March and April of 2000, Gray wrote up three separate aircraft for window problems in the cockpit, and Rogers got mad. On September 12, 2000, when maintenance challenged a "start lever" write up, Gray made a hostile work environment complaint to Human Resources to get "the maintenance department off my back." In response, a meeting was held in October, 2000, where Gray was accused of writing up more airplanes than anyone else. The meeting went to Gray's satisfaction and since then things "have remained perfect." Gray has never received any form of discipline during his career with Respondent.

### **Andrew Shostack**

Andrew Shostack is the Contract Administrator with the Airline Pilots Association who, as a union attorney, has represented Respondent's pilots for six years. He considers himself to have an attorney/client relationship with every pilot. He was present in the May meeting where Baker was concerned about Complainant's anger and offered him the informal option of seeing Nancy Hay, a psychologist. Complainant chose the formal option of being seen by a psychiatrist. As to the Section 19 discipline charge made by Baker against Complainant concerning the conversation with the scheduler, Shostack has no opinion of Baker's motivation except what is contained in the charging letter. Mid-level management had pressure from upper management to keep aircraft moving.

Shostack testified he knows of no pilot fired for "writing up" an aircraft, but he says there is pressure on pilots to move airplanes. Pilots complain, but since McClelland has taken over, the aircraft are "in the best shape they have been in in years." Captain Gray is the only one Shostack knows who has made a harassment complaint. He is aware of no harassment involving Complainant.

### **John McIlvena**

John McIlvena is a first officer with Respondent for the last four years. In October of 2000, Russ Gilmore complained to him about Complainant's many ACARS write ups. Subsequently, McIlvena was in Baker's office in August, 2001, as a union representative for another pilot, when Complainant's name came up and Baker noted that in his opinion the article Complainant wrote for the pilot's newsletter was unprofessional and Complainant should be careful. As a pilot, McIlvena, found Complainant to be "very safety conscience and professional," and he understands this suit is about Complainant's allegations that he is the target of frequent management attention and discipline. He also knows Complainant is "a vocal guy" and says what he thinks and rubs some people "the wrong way." He thought Baker and Complainant obviously did not get along, and he too suggested boxing gloves as a solution.

As far as flying, McIlvena feels pressured to move the aircraft, and on occasion has been hesitant to write up an aircraft or refuse a flight. Last year he had a Section 19 letter put in his file for a refused assignment.

### **Beverly Williamson**

Beverly Williamson is Respondent's Human Resources manager for the eastern and central regions. She wrote Complainant's Section 19 charging letter. The letter came from a common format. The language that discipline could include "termination" is found in the code of conduct.

### **Patrick Sakole**

Patrick Sakole has been Vice-President of Safety with Respondent since September 19, 1999. His main function is to ensure safe operation of the airlines. Before ACARS, pilots called in their times. ACARS is much more accurate and efficient. Federal regulations impose restrictions on pilots duty as well as flight times. These are standards for operation for a commercial airlines, and if exceeded is a violation.

Fatigue is when a pilot does not feel capable of continuing a flight in a safe manner. Flying fatigued could be a potential violation of regulations, and pilots should not be intimidated to fly. Sakole knew nothing of Complainant until Complainant wrote

him about fatigue in September 2000, and Sakole in turn responded. However, Sakole testified he was dealing with the issues on a “larger vein,” not just with Complainant. Complainant’s letter, he explained, was a catalyst that caused him to look at the scheduling process. Any specific issue of intimidation was a matter for the Chief Pilot to address. Event reports are required by regulations and are used by Respondent to gauge the day to day running of the operation.

### **Robert Verna**

Robert Verna is manager of scheduling having worked his way up from clerk over a 15 year period. Pilots have the right to question schedules. Pilots can fly a schedule and grieve it or refuse to fly. He is aware of Complainant’s refusal to fly an assignment in March, 2001, when Complainant questioned the legality of the assignment. Complainant never gave an indication that he would accept the flight, so Verna gave him a refused assignment (RA) right up. He has never known of a scheduler intentionally constructing an illegal pairing. In scheduling a pilot, schedulers make certain the pilot is legally able to fly the pairing. This is done by experience, training and through automation. If Maestro has an error it could result in a pairing violation, and Maestro is accurate only through human input.

### **Susan Farrell**

Susan Farrell is a first officer on the B-757's and has worked for Respondent since February of 1997. She has filed grievances but never been disciplined. She knows Complainant and finds that he is not an “easy” person because he has a very high moral and ethical standard.

Farrell believes the flip-flop pairings are fatiguing and dangerous. She has called in “sick” six times or so from being fatigued. She has also written many event reports concerning safety issues. She has had three events over which she “tangled” with Baker, involving a trim issue, spoiler malfunction and a fatiguing schedule because of a reduced rest flip-flop. Baker was not helpful, nor was Clarence King concerning a ground radio problem. She blames that primarily on the article which was written by Complainant and published by the newsletter, to which she invited a response from Baker.

## **Brian Bevins**

Brian Bevins has been a pilot with Respondent since 1989. He is currently a captain and has served on several committees. He was chairman of the Grievance Committee and served on the Systems Board. He is presently chairman of the communications committee. Over the years he has raised safety issues by dozens of event reports and/or talking with management. His latest encounter with Baker has been since September 11, and concerned in-flight restroom security. Baker was not helpful, but Bevins said he has never had any conflicts with Baker nor has he ever been disciplined. He feels, however, some pilots have had action taken against them for retaliatory reasons, and believes Complainant is one such pilot because he found it unusual Complainant was sent to a psychiatrist. He does not know the origin, but believes hostility exists between Complainant and Baker; however, he has never heard of anyone being upset with Complainant for raising safety concerns.

As far as internal union politics, Bevins observed that he and Complainant are in “different political parties.” He agreed Complainant’s style of communication is harsh. In fact Complainant was at odds with members of the union leadership counsel, David Chambers and Bill Goin, for his public undermining of their positions regarding union politics. Bevins tried to get Complainant to communicate effectively, but Complainant’s continued remarks provoked the following e-mail from Chambers on July 3, 2002:

You have a lot of fine criticisms, Sam, but you have yet to offer one solution for any of the issues this union faces. Sam, you are not an elected official. You are appointed by Bill Goin and myself. You, my friend, have gasped your last breath as a union volunteer. I won’t have a volunteer actively working against the union direction. So eat it, live it, resign, or prepared to be fired.

On July 25, 2002, Bevins removed Complainant from his position as editor of the newsletter because of Complainant’s harsh style of communication, not the substance of his messages.



### **Jill Jesensky**

Jill Jesensky is a 13 year pilot with Respondent. She is currently the Chair of the Professional Standards Committee. Complainant called her concerning §19 disciplinary action because of Complainant's conversation with the scheduler. She tried to persuade Baker to exercise his discretion and handle the situation with the "side letter" under professional standards jurisdiction. She thought it odd that Baker would not agree, but does not know his motives or reasonings. Chronic refused also. Jesensky says she has no idea what was behind all this but imagines "one thing is building on another and is building on another and that . . . the conversation with the scheduler triggered the last straw."

As far as Complainant is concerned, she finds him overly focused on "something that, in my view does not seem the same as his opinion." She also testified that she has made numerous fatigue and maintenance complaints but has never been disciplined. Neither has she ever felt any negative actions were being taken against her. "I don't ever get pressured about things that have to do with bad weather, fuel issues or fatigue issues. I make a decision, and it's just done."

### **Dr. Joseph Battersby**

The record contains testimony of three medical providers, Drs. Joseph Battersby, Alvin Burstein and James Lane, PhD. The former is Senior Medical Examiner for FAA and has given Complainant his flight physicals for several years. As with many other pilots, Dr. Battersby's found Complainant stressed about schedule and maintenance issues. He considers Complainant a friend and also highly respects Captain Baker. Ultimately, it was Dr. Battersby who referred Complainant to Dr. Lane.

### **Dr. Alvin Burstein**

Dr. Burstein has been a psychiatrist for 23 years. He is board certified. He saw Complainant at the request of Baker following the May, 2000, meeting and found Complainant's obsessive compulsive personality to be a "disorder" which he defined as:

it means that it is a persistent style that becomes harmful to the person so that they interact with the world in a certain

repeatable, consistent pattern, and it seems quite natural to them but nevertheless it causes ongoing problems.

Such a personality, Dr. Burstein explained, can cause a person to “have a sense of absolutely correctness in their perceptions” and to be “indifferent towards others perception .” He thought that Complainant was having “occupational conflict,” some of which Dr. Burstein contributed to Complainant’s personality disorder. In other words, it is Complainant’s “style” that can get him in trouble.

**James Lane, PhD.**

Dr. Lane is a psychologist who has seen Complainant approximately 26 times since July 27, 2001, at an hourly rate of \$125.00. He does not find Complainant to have an obsessive compulsive personality disorder, but rather frustration as a result of conflict which he characterizes as an adjustment disorder with anxiety as a result of the conflict. He placed Complainant on disability in August 2001, and it was Dr. Lane’s opinion at the hearing in September 2002, that Complainant was not capable of flying until his stressors “changed.” Despite his prognosis, Complainant returned to work in November.

**Findings of Facts and Conclusions of Law**

The employee protection provisions of the Act are set forth at 49 U.S.C. §42121 (passed April 5, 2000). Subsection (a) describes discrimination against airline employees as follows:

No air carrier or contractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)

(1) provided, caused to be provided, or is about to provide (with any kind of knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating

to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a).

The law developed under the whistleblower protection provisions of the Energy Reorganization Act of 1974 (“ERA”), as amended in 1992, the Whistleblower Protection Act (“WPA”) and environmental statutes provide the framework for litigation arising under the Act. See regulations, 29 C.F.R. Part 1979. The statutory scheme established by the Act essentially mirrors the protective provisions of the prevailing nuclear and environmental statutes. The exception is that the Act provides extraordinary powers to OSHA to order immediate reinstatement of airline employees upon a showing of reasonable cause. Accordingly, the jurisprudence developed under existing whistleblower statutes will be applied to the instance case.

Under the Act, complainant has an initial burden of proof to make a prima facie case by showing (1) the complainant engaged in a protected activity; (2) the complainant was subjected to adverse action; and (3) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action. 49 U.S.C. §42121(b)(2)(B)(i); 29 C.F.R. §1979.104(b)(1-2). When the complainant reaches the hearing stage, the complainant must demonstrate, by a preponderance of the evidence, that he engaged in protected activity which was a contributing factor in the employer’s alleged unfavorable personnel decision. 49 U.S.C. §42121S(b)(2)(B)(iii); 29 C.F.R. §1979.109(a). Only if the complainant meets

his burden does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. 49 U.S.C. §42121(b)(2)(B)(iv); 29 C.F.R. §1979.109(a).

It is my finding that Complainant has not demonstrated that his engaging in protected activity was a contributing factor to Respondent's unfavorable personnel action; to the contrary, I find Respondent would have taken the same unfavorable personnel action in the absence of any protected activity on Complainant's part.

It was stipulated at the outset of the hearing that both parties are covered by the Act; and the evidence is most clear that Complainant voiced, verbally and in writing, safety concerns, both internally and to FAA, sufficient to constitute protected activity under the Act.

As demonstrated in detail in the evidence section of this decision, since 1995 Complainant has complained of fatigue, fatiguing pairings, inaccurate timekeeping records, maintenance deficiencies and duplicate pages in cockpit manuals. These complaints were made both to Respondent's management as well as to FAA. They were not done in secrecy; and any one of these, in my opinion, easily rises to the level of a safety concern and thus protected behavior under the Act.

FAA told Complainant in writing that flying fatigued or being coerced by an Employer to do so is a violation of the regulations. Likewise, a pilot's time and duty hours are limited by regulations. Consequently, inaccurate record keeping can result in violations of the regulations. In sum, the answer is clear, Complainant voiced safety concerns, and Respondent had knowledge of Complainant's actions. The question now becomes whether Complainant was retaliated against for his safety concerns, and, as I have previously expressed, I find he was not.

Any hostility Complainant experienced in his work environment was of his own creation, not that of Respondent's. In other words, I do not find Complainant was discriminated against, harassed or disciplined because of any protected activity on his part.

As with other whistleblower statutes, the obvious goal of the Act is to provide protection against retaliation for employees expressing safety concerns. In this

instance, I do not find that any of the actions taken against Complainant were designed to prevent him from expressing safety concerns or, for that matter, were so severe as to alter Complainant's conditions of employment or create a hostile work environment. The activity which gave rise to any disciplinary action being taken against Complainant was not safety in nature. The activity which gave rise to any disciplinary action being taken against Complainant was brought about by his manner and method of addressing his concerns to others. Complainant certainly enjoys a protected right to voice safety concerns, but likewise Respondent enjoys the right to maintain order and respect in the work place, and, in my view, it appears from the evidence presented that the latter is what Respondent was attempting to accomplish.

In reaching my conclusion, I am not suggesting that Complainant's conduct was so indefensible that he forfeited his protection under the Act. What I am suggesting is that an employer is not required to overlook an intemperate manner in which an employee makes a complaint simply because the nature of the complaint involves safety concerns.

In this case, the record contains the testimony of at least 10 active pilots, other than Complainant himself. To a person, in the course of their employment with Respondent all have made numerous safety complaints and writeups concerning fatiguing trips and maintenance deficiencies; however, none have had any disciplinary action taken against them for expressing safety concerns. As with any work environment, all were not always pleased with the responses they received from management when they did complain, but none expressed a fear of management retaliation that caused them to muffle their safety concerns. In fact, those that were asked, such as Russ Webber, knew of no pilot who was disciplined for safety concerns, and none attributed any action taken against Complainant as being retaliatory for safety concerns.

Regarding Complainant, of all the pilots who were asked none really could say what was going on between Complainant and Baker, but neither did any suggest it involved safety concerns. Egos, personality clashes, the article Complainant wrote or as Jesensky said things were building on each other and "the conversation with the scheduler triggered the last straw." Two who testified even suggested boxing gloves might be a solution, but all echoed, as did Bevins, that they never heard anyone expressing displeasure with Complainant over safety issues.

In an airline environment it appears every layer of the operation is populated by professionals who are intelligent, self-assured and competent. Whether middle management, upper management or in the cockpit, each group has an ego, and the corporate dynamics are typical of any industry. Upper management is trying to make a profit, middle management is trying to reach the goal of upper management while also trying to abide by rules and regulations and maintain a sense of satisfaction among the employees, and the pilots online in turn feel the buck stops with them both as to performance and safety. In such a mix, it became clear during the trial that these various layers of the corporate structure often stay at odds with each other in an effort to achieve their respective goals, and to add to that recipe an angry person who attacks anyone who disagrees with him is not a desirable ingredient.

In the earlier part of this decision, I cited many occasions since 1995 where Complainant chose to take a “harsh” tone toward those in management, the FAA and his own union. Therefore, by May 2000, when Complainant became angry at a meeting with Baker over a flight cancellation in Las Vegas that affected 190 passengers, I do not find it unusual that Baker would have suggested counseling. Baker’s letter to Dr. Burstein (CX 25) communicates his concerns toward Complainant, whose anger had become more and more obvious over the years. Safety concerns voiced by Complainant were not the motivation.

While there is testimony that some were surprised that such a reaction from Baker came about at a meeting called over a cancelled flight, none testified that counseling was unheard of or designed to avenge safety concerns. Informally seeing a counselor was not an unusual occurrence, as Stadler, who himself had seen one, explained. It was Complainant who took the request to another level and sought a formal charge. Had he followed Baker’s advice and seen Nancy Hay informally, one wonders if the results might have been different?

Complainant’s refused assignment was written up in March, 2001, by Verna, manager of scheduling, because Complainant argued about the assignment to the point that Verna testified time constraints dictated he find another pilot, not because of safety concerns. Interestingly, just as with Baker’s request that Complainant see a counselor, Complainant won both events on appeal.

The final action, and the only specific event that occurred within 90 days of Complainant’s filing his complaint within the statute of limitations provided by 49 U.S.

§42121(b)(1), involves the Section 19 letter charged by Baker for Complainant's conversation with scheduler Schneider. Complainant's concerns with Schneider involved the accuracy of duty and flight time records, and there is no evidence Complainant was disciplined for any reason other than his "harsh" approach to a problem that had been remedied by Schneider's supervisor.

There is no doubt that Schneider made a mistake in building Complainant's pairings following his May, 2001, trip to Baltimore. Neither is there any doubt that regulations require accurate keeping of a pilot's time, nor is there any dispute that Schneider's supervisor, Runk, corrected the mistake and apologized. Yet, just as Chronic found in his letter of December 10, 2001, (from which Complainant as of trial time had not chosen to pursue on appeal), Complainant

. . . chose to pursue such a discussion even after your problem had been addressed, fixed, and apologized for by Coordinator (supervisor) Julie clearly indicates an intent to accuse, intimidate, and abuse scheduler Nick; the call served no other purpose. (CX 94).

Was the charging letter a drastic measure? In reflection, I find from the evidence it was not. It was the culmination of Complainant's pattern of conduct. "Side letters" provide an informal method for addressing such inappropriate behavior, but when Baker had tried an informal method in the past by suggesting counseling, Complainant demanded a formal charge.

The only punishment attendant to the Section 19 letter was the fact it was to be placed in the recipients personnel file. Both McIlvena and Andrews had received such letters for varying reasons, but with no effect on their careers. Consequently, it is my finding from the evidence that this was the "final straw" in an episode that had its origin in Complainant's numerous displays of anger and inappropriate behavior towards others, be it management, fellow workers, union representatives or Federal agencies. Without dispute, since the union contract of 1995, Complainant had felt Respondent, the union and FAA were "burying their heads in the sand" and he angrily undertook to convince them otherwise.

I am not unmindful of the verbal jabs each took at the other, as well as Baker's offhanded comments and threats of making Complainant a target during hunting season.

However, in his brief, Complainant states on page 1 that “Baker did not have a personal dislike of Captain Herchak.” So what is the answer? From the evidence presented, I am not persuaded that safety concerns caused the conflict between the two men, or for that matter with anyone in management. Had that been so, most of the pilots who testified would have been victims of management’s displeasure because all voiced the same safety concerns as Complainant (fatiguing schedules, maintenance and timekeeping). To a person, none spoke about or knew of any pilot being disciplined for safety concerns. Complainant and Baker had been acquainted for years as pilots, but once Baker advanced to management in 1999, he too became the recipient of Complainant’s hostile messages. (CX 10). Thereafter, as Complainant admits, his dialogue with Baker came to an end, and obviously, it culminated with the Section 19 letter. All things considered, in my view of the evidence presented, Complainant’s confrontational behavior, not safety concerns, spelled the turning point in the relationship.

In other words, the evidence suggests a scenario that when all is said and done it was never Complainant’s message that caused him problems with management, the union and his fellow workers, it was his style. Whether Complainant understands that or not, I am not certain for when asked about Dr. Burstein’s diagnosis of “obsessive compulsive personality” Complainant said he took it as a “compliment” that “this personality is actually something that is an excellent characteristic of pilots or anybody that is in a technical field.” While I do not think anyone would disagree with that assessment, should it not be tempered with the reservations that, as Dr. Burstein warned, it not become a disorder that causes one to have a sense of absolute correctness that is indifferent to others perceptions?

### Conclusion

I cannot remedy perceived flaws in collective bargaining agreements, nor do I have any authority to revise FAA guidelines. While I hope that a safe and fair resolution is reached which can satisfy the needs of the public and goals of both the pilot’s union and management regarding pairings, this is not the forum to accomplish that mission. As far as Complainant is concerned, I trust I will always fly with pilots of his ilk. I find him to be sincerely concerned about airline safety, but I do not find that he has been disciplined by Respondent for these concerns. Complainant has a history of communication problems and confrontations with others, as were fully



discussed above, and I find from the evidence that his discipline was a result thereof and not protected activity on his part.

### ORDER

Based upon the foregoing, Complainant has not established a case of retaliation by Respondent and his complaint is hereby DISMISSED.

So ORDERED this 27<sup>th</sup> day of January, 2003, at Metairie, Louisiana.

A

C. RICHARD AVERY  
Administrative Law Judges

CRA:kw